



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 20, 2012

CBCA 2346-FEMA

In the Matter of CITY OF MOSS POINT, MISSISSIPPI

Ernest B. Abbott of FEMA Law Associates, PLLC, Washington, DC; and Amy St. Pé and Nathan Bosio of Dogan & Wilkinson, PLLC, Pascagoula, MS, counsel for Applicant.

Robert R. Latham, Jr., Executive Director, Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS; and Charles B. Barksdale, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **DANIELS** (Chairman), **GOODMAN**, and **McCANN**.

Pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 *et seq.*, when the President declares that a natural disaster exists, the Federal Emergency Management Agency (FEMA) may provide various types of assistance in the affected area. Among these varieties of help are public assistance grants to states, local governments, and certain non-profit organizations for the repair, restoration, and replacement of damaged facilities. *Id.* § 5172; 44 CFR 206.200 *et seq.* The City of Moss Point, Mississippi (Moss Point), has asked the Civilian Board of Contract Appeals to arbitrate a dispute with FEMA over the amount of money which should be provided in such a grant for the repair and/or replacement of portions of the city's sewer system which the city maintains were damaged by the storm surge caused by Hurricane Katrina in 2005. The case is before us under authority of section 601 of Public Law 111-5, the American Recovery and

Reinvestment Act of 2009, and section 206.209 of title 44 of the Code of Federal Regulations.

Both of these parties, as well as the Mississippi Emergency Management Agency (MEMA), presented written statements and documents to the panel of Board judges which was assigned to resolve the dispute. In responding to the city's allegations, FEMA suggested, and the city and MEMA agreed, that the parties jointly select an engineer who would conduct an independent investigation of the matter and make various findings which could serve as the basis for a settlement. The parties selected Allen & Hoshall of Ridgeland, Mississippi, as the engineering firm to conduct the study. The report issued by Allen & Hoshall prompted considerable controversy and impelled the parties away from, rather than toward, settlement. Consequently, the panel convened a hearing and took testimony from several engineers (including some from Allen & Hoshall), as well as other individuals, in an effort to gain information on the basis of which we could resolve the dispute.

Moss Point asserts that damage to the sewer system caused by the Hurricane Katrina storm surge was shown by the following facts: As a result of the storm surge, eighty percent of the city was flooded, and so much debris was created that removing it took a year and a half. Hundreds of tons of debris had to be removed from the sewer system, and even after some of it was removed, so much silt remained that pumping station parts became clogged and had to be replaced at a rate five times greater than before the storm. Sinkholes appeared throughout the city at places under which pipes ran, and this occurred far more frequently than had happened previously. Prior to the hurricane, the city's sewer system was old but was operating properly (if somewhat inefficiently); the former city engineer analogized it to an old jalopy that didn't run great, but worked sufficiently well to get one to and from his place of employment. After the storm, numerous cracks were discovered in the pipes and the joints between the pipes, and some pipes were found to sag considerably. According to a statistician, more rainwater entered the system (which was not part of the city's stormwater drainage system) per volume of rainfall than had entered earlier.

FEMA acknowledges that the storm surge flooded much of the city, that much debris had to be removed, that sinkholes appeared in far greater number than had happened before the hurricane, and that pumping stations were damaged by the storm and ensuing surge. However, the agency notes, it has already paid for removal of debris and replacement of pumps, and it has obligated funds to fill sinkholes and replace roadways which were made impassable due to the post-Katrina occurrence of the sinkholes. FEMA also paid for the cleaning and video recording of approximately 20,000 linear feet of the sewer system to create data on which Allen & Hoshall could prepare its report. Testimony of the engineers from that firm who wrote the report and other engineers who reviewed it was that the Moss Point sewer system, even after the hurricane, resembled nothing more or less than an old

system which had been subject to inadequate maintenance over a long period of time. The engineers called as witnesses by FEMA did not see any evidence of damage that would have been caused by a catastrophic event.

The panel finds the analysis of the engineers presented by FEMA to be compelling. We note that even the independent engineer who was called by Moss Point, and opined that some of the damage to the system must have been caused by the storm surge, conceded that the Allen & Hoshall report was “reasonably correct.” While video inspection revealed various cracks in pipes and joints, no evidence was offered to prove that any of the damage was caused by Hurricane Katrina and its storm surge, rather than by deterioration prior to or since the hurricane.

Moss Point has failed to convince the panel that Hurricane Katrina and its ensuing storm surge did significant damage to the antiquated Moss Point sewer system. FEMA has already paid for or obligated funds to remedy most of the damage resulting from the storm surge. The only aspect of storm damage which was not effectively addressed by the agency’s presentation is the silt in the system which is causing pumping station parts to wear out at an exceedingly rapid rate. We make no finding as to whether this silt is carried into the pipes by rainfall at a greater rate than occurred prior to the hurricane or, if it is, the reasons why; we are not sure that the city’s statistician’s analysis and conclusions are valid (they were contested by an Allen & Hoshall engineer). However the silt gets into the pipes, though, we believe that it is the cause of the need for frequent replacement of pump parts. FEMA has already paid to clean the pipes which were examined for the Allen & Hoshall report. The agency has, for other Gulf Coast cities, covered in public assistance grants the cost of cleaning sewer pipes in areas that were affected by a Katrina storm surge of greater than four feet. We direct the agency to revise its project worksheets for the Moss Point sewer system to include in its public assistance grant the cost of cleaning the pipes in areas which (a) were affected by a Katrina storm surge of greater than four feet and (b) have not already been cleaned at federal expense.

STEPHEN M. DANIELS
Board Judge

ALLAN H. GOODMAN
Board Judge

R. ANTHONY McCANN
Board Judge